

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

75-1435

**United States Court of Appeals
For the Second Circuit**

B
PFS

Docket Numbers 75-1435, 1440;
76-1005

UNITED STATES OF AMERICA,

Appellee,

v.

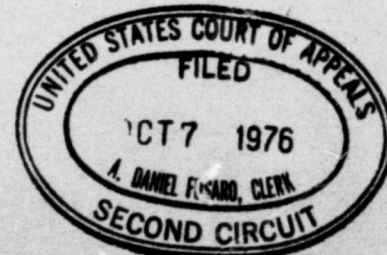
LAM LEK CHONG, a/k/a Jimmy Lam,
YUK CHOI CHUNG, a/k/a David Chan,
and FRANCISCO LIGANOZA,

Appellants.

On Appeal From The United States District
Court For the Southern District of New York

PETITION ON BEHALF OF APPELLANT YUK CHOI
CHUNG FOR REHEARING WITH A SUGGESTION FOR
REHEARING EN BANC OR IN THE ALTERNATIVE FOR
THE ISSUANCE OF AN ORDER STAYING THE MANDATE
OF THIS COURT AND CONTINUING THE APPELLANT ON
BAIL PENDING APPLICATION FOR CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

LAM LEK CHONG, a/k/a Jimmy Lam,
YUK CHOI CHUNG, a/k/a David Chan,
and FRANCISCO LIGANOZA,

Appellants.

Docket Numbers

75-1435, 1440;
76-1005

-----X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

PETITION ON BEHALF OF APPELLANT YUK CHOI
CHUNG FOR REHEARING OR IN THE ALTERNATIVE
FOR THE ISSUANCE OF AN ORDER STAYING THE
MANDATE OF THIS COURT AND CONTINUING THE
APPELLANT ON BAIL PENDING APPLICATION FOR
CERTIORARI TO THE SUPREME COURT OF THE
UNITED STATES

To The United States Court of Appeals For The Second Circuit:

YUK CHOI CHUNG*, one of the appellants above named,
respectfully petitions this Honorable Court for a rehearing of the appeal
in the above -entitled case and in support of this petition represents to
the Court as follows:

The appellant reserves his argued position as to each of
the points heretofore raised on appeal, but in this petition addresses
himself solely to those aspects of the opinion of this Court decided on
September 27, 1976, wherein the Court may be convinced that its result

*Hereinafter referred to by his anglicized name, Chan.

is based on the misapprehension of certain matters pertaining to the issues originally raised on appeal.

Therefore, this petition respectfully seeks to convince the Court that it has erred in its determination with respect to the following stated issues:

First, the ruling that it was "Harmless Error" to permit the prosecutor to cross-examine the appellant Chan concerning a statement made to Agent Gartland, a copy of which, inadvertently or otherwise, had not been furnished to trial counsel for the appellant, is improper and contrary to prior rulings of this Court.

Second, the ruling that those portions of the tape recording containing conversations held in the Chinese Language between the appellants Chan and Lam were admissible is based upon a misinterpretation of the rulings of the Supreme Court of the United States in Lopez v. United States, 373 U.S. 427 (1963) and Katz v. United States, 389 U.S. 347 (1967), and of this Court in United States v. Kaufer, 406 F. 2d 550, 551-52 (2d Cir.), aff'd mem. , 394 U.S. 458, rehearing denied, 395 U.S. 917 (1969), and was of Constitutional dimension (United States Constitution, Fourth Amendment).

If the instant petition for rehearing is denied, the appellant Chan respectfully petitions this Court for the issuance of an order staying the mandate of this Court and continuing him on bail pending the disposition of a Petition for a Writ of Certiorari to be filed with the Supreme Court of the United States in accordance with the statutes and rules applicable thereto.

As To A Rehearing Of The Limited Aspects Of This Appeal

I.

The ruling that it was "Harmless Error" to permit the prosecutor to cross-examine the appellant Chan concerning a statement made to Agent Gartland, a copy of which, inadvertently or otherwise, had not been furnished to trial counsel for the appellant, is improper and contrary to prior rulings of this Court.

The Court in its opinion recognized that appellant Chan's counsel was entitled to a copy of same pursuant to Rule 16 FRCP, but held that the failure to furnish same, through inadvertence, was "at most harmless error" (S.O. 5745)*. In reaching this conclusion, the Court ignored the fact that pre-trial knowledge of the existence of such a statement would have affected the trial strategy entered into by appellant Chan and his counsel and very probably and possibly would have resulted in his electing not to take the stand and expose himself to such questioning. The import was previously recognized by this Honorable Court in U.S. v. Padrone, 406 F. 2d 560 (1969), where this Court reversed under similar circumstances a Judgment of Conviction entered after a non-jury trial where obviously the prejudice sustained by a defendant would be much less than that in a jury trial.

*Numerals preceded by "S.O." refer to pages of the Slip Opinion of this Court.

II.

The ruling that those portions of the tape recording containing conversations held in the Chinese Language between the appellants Chan and Lam were admissible is based upon a misinterpretation of the rulings of the Supreme Court of the United States in Lopez v. United States, 373 U.S. 427 (1963) and Katz v. United States, 389 U.S. 347 (1967) and was of Constitutional dimension (United States Constitution, Fourth Amendment).

The Court has ruled that "the Fourth Amendment did not bar the use at trial of the recordings of various conversations between Lam and Chan in Chinese " (S.O. 5748). The Court cited as authority for this the case of Lopez v. United States, 373 U.S. 427, 439 (1963). It is respectfully submitted that this Honorable Court has misinterpreted the ruling of the Supreme Court of the United States in the case of Lopez v. United States (supra). There, the United States Supreme Court said:

"Indeed this case involves no "eavesdropping" whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." (373 U.S. 439, 10 L. Ed 2d 470) [Emphasis supplied.]

In the Lopez case, the defendant knew he was dealing with Government agents, which is not true in the instant case. The appellant and his co-defendant Lam had established to their satisfaction prior to the conversations had between them in Chinese that the other two men

present at the conversation (unknown to them to be Government agents) did not speak or understand Chinese. In addition, in an apparent effort to secure for themselves privacy, they spoke in one of the more esoteric dialects of the Chinese Language, known to an extremely limited number of persons of the Chinese Race, namely the Ha Ka (phonetic) dialect. To state that the appellants "Lam and Chan assumed the risk that the agents could speak Chinese or have with them a recorder to tape the conversations for later translation" is, it is respectfully submitted, not realistic. As pointed out supra, such assumption of risk, which were delineated in Lopez v. United States (supra), might have existed in Lopez due to the fact of the knowledge that the defendant was dealing with a disclosed Government agent.

The same factual situation exists in United States v. Kaufer (supra) in that the defendant was knowingly conversing and dealing with an agent of the United States Government. That this Court's decision in the Kaufer case revolved upon that issue is apparent by its choice of quotation from Lopez v. United States (supra) used therein. This quotation emphasized the fact that the taping of the conversation was one in which "the Government's own agent was a participant."

In reaching the conclusion that the Court did in the instant case, it completely ignored the ruling and decision and opinions in Katz v. United States, 389 U.S. 347, 19 L.Ed. 2d 576, in which it held that "the Fourth Amendment protects people, not places" (389 U.S. 351).

As in Katz, the circumstances of the taping of the conferences

held in the hotel room selected by the Government agents were such that it did not present any problem to the Government to obtain in advance an order or warrant to lawfully seize the conversations had between the appellants. In discussing this invasion of privacy, Mr. Justice Stewart in delivering the opinion of the Court in Katz v.

United States (supra) stated:

"... it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the ... allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' *Osborn v. United States*, 385 US 323, 329-330, 17 L ed 2d 394, 399, 87 S Ct 429. Discussing that holding, the Court in *Berger v. New York*, 388 US 41, 18 L ed 2d 1040, 87 S Ct 1873, said that 'the order authorizing the use of the electronic device' in *Osborn* 'afforded similar protections to those ... of conventional warrants authorizing the seizure of tangible evidence.' Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' *Id.*, at 57, 18 L ed 2d at 1051. Here, too, a similar judicial order could have accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance." (389 U.S. 354-55, 56; 19 L. Ed. 2d 584, 585).

Conclusion

As to staying the issuance of the Court's mandate and continuing the appellant on bail pending application for a Writ of Certiorari to the Supreme Court

If this Court should deny the instant petition for a rehearing the appellant Chan intends to present to the United States Supreme Court a petition for a writ of certiorari. It is respectfully prayed that the issuance of the mandate of this Court be stayed and the petitioner continued on bail until the determination of said petition for a Writ of Certiorari.

Appellant Chan was originally released on bail in the sum of \$5,000 and after his conviction, the bail was increased, at the request of the Government, to the sum of \$7,500. The additional bail was furnished through the assistance of his family and friends the following day, and he has been continuously at liberty on the bond in the sum of \$7,500 since December 18, 1975.

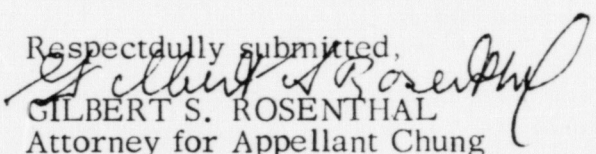
The appellant is a married man, legally admitted for permanent residence to the United States and resides with his wife and children (a daughter, age 13, and a son, age 6), both of whom attend the public schools of the City of New York. He has no prior record of conflict with the law and has always responded to the edicts of the Court and fulfilled his prior obligations.

It is respectfully submitted that the questions above discussed, as well as those set forth in the original appeal, are not frivolous but in fact are questions of great substance and significance which merit a review by the United States Supreme Court.

No prior application for the relief sought herein has been made.

For the foregoing reasons, appellant herein respectfully requests that a rehearing be granted or that, in the alternative the issuance of the mandate of this Court be stayed and the appellant Chan continued on bail pending the filing and disposition of his Petition for a Writ of Certiorari to the Supreme Court of the United States.

Respectfully submitted,

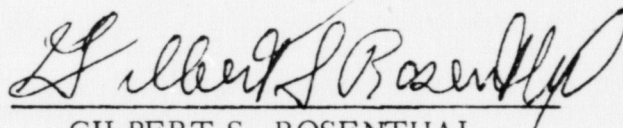

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Dated: October 7th, 1976.

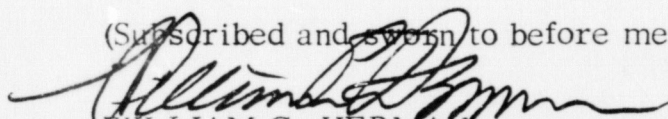
STATE OF NEW YORK)
 (ss. :
COUNTY OF NEW YORK)

GILBERT S. ROSENTHAL, being first duly sworn, on
oath certifies and says:

That he is the attorney for the appellant in this cause;
that he makes this certificate in compliance with the rules of this
court; that in his judgment the within and foregoing petition is well
founded and is not frivolous or interposed for delay.


GILBERT S. ROSENTHAL

(Subscribed and sworn to before me this 7th day of October, 1976)


WILLIAM C. HERMAN

Notary Public, State of New York
No. 60-1770600
Qualified in Westchester County
Term Expires March 30, 1977

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

LAM LEK CHONG, a/k/a Jimmy Lam,
YUK CHOI CHUNG, a/k/a David Chan,
and FRANCISCO LIGANOZA,

Appellants.

SUGGESTION FOR A
REHEARING EN BANC

Docket No. 75-1435

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The Petitioner, YUK CHOI CHUNG, suggests to this Court that his Petition for a Rehearing in the above-entitled case and filed on even date herewith be heard en banc for the following reasons:

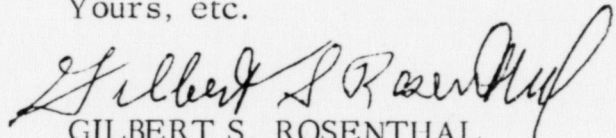
1. The issues raised by the Petitioner in his Petition for a Rehearing directly confront the issue of the violation of the Fourth Amendment rights of the appellant Chung to privacy and to illegal seizure of his private conversation by means of electronic eavesdropping. The importance of this question raised by Petitioner in his appeal is of great and general significance.

2. The decision entered by this Court affirming Petitioner's conviction came almost five and one-half months after oral argument and in this Court's Opinion it was acknowledged that Petitioner's argument had force.

3. The decision entered by this Court affirming Petitioner's conviction contradicts the prior rulings of this Circuit in United States v. Padrone, 406 F. 2d 560 (1969).

WHEREFORE, the Petitioner, YUK CHOI CHUNG,
respectfully suggests that he be granted a rehearing of the above
appeal en banc.

Yours, etc.

A handwritten signature in cursive script, appearing to read "Gilbert S. Rosenthal".

GILBERT S. ROSENTHAL
Attorney for Petitioner Yuk Choi Chung
Office & P. O. Address
401 Broadway
New York, New York 10013
(212) 226-7971

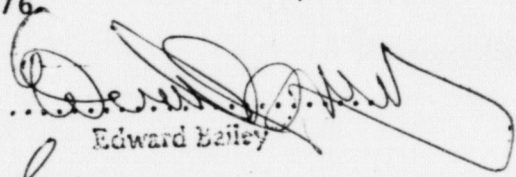
ROSENTHAL & HERMAN

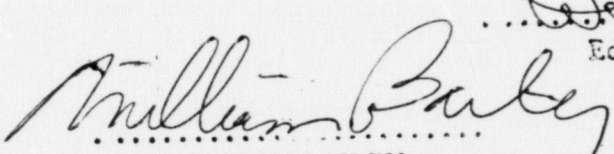
AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 7 day of Oct. 1976 at No. 1 St. Andrews Pl., NYC deponent served the within Brief upon: U.S. Atty., So. Dist. of N.Y. the Appellee herein, by delivering ~~xxx~~ 3 true copies ~~xxx~~ thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 7 day of Oct., 1976


Edward Bailey


WILLIAM BAILEY

Notary Public, State of New York
No. 43-0182945

Qualified in Richmond County
Commission Expires March 30, 1978

COPY RECEIVED
OCT 7 1976
ROBERT B. FISKE JR.
U.S. ATTORNEY
SO. DIST. OF N.Y.

